IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
May 5, 2009 Session

PATRICIA B. STEWART v. CHALET VILLAGE PROPERTIES, INC. ET AL.

Appeal by Permission from the Court of Appeals
Circuit Court for Sevier County
No. 2006-0137-I Ben W. Hooper II, Judge

No. E2007-01499-SC-R11-CV - Filed November 3, 2009

NOT FOR PUBLICATION

This case involves the validity of an exculpatory clause in a short-term residential lease agreement between a rental agency and the plaintiff. The day after entering into the lease agreement, the plaintiff fell on a walkway leading to the entrance of the rental property. The plaintiff filed suit against the rental agency and the owner of the property alleging that they were negligent in failing to properly maintain the walkway and failing to warn the plaintiff of the walkway's condition. The trial court granted summary judgment to the rental agency, upholding the exculpatory clause in the lease agreement. In reversing the trial court, the Court of Appeals held that the exculpatory clause in favor of the rental agency was invalid as contrary to public policy. We conclude that the trial court failed to apply the factors adopted by this Court in Olson v. Molzen, 558 S.W.2d 429, 431 (Tenn. 1977), for determining whether an exculpatory clause violates public policy and that the application of these factors is hampered by an incomplete record. We therefore reverse the judgment of the Court of Appeals and remand the case to the trial court for further proceedings consistent with this opinion.

Tenn. R. App. P. 11 Appeal by Permission; Judgment of the Court of Appeals Reversed

JANICE M. HOLDER, C.J., delivered the opinion of the court, in which CORNELIA A. CLARK, GARY R. WADE, and WILLIAM C. KOCH, JR., JJ., joined. SHARON G. LEE, J., not participating.

Jonathan E. Roberts, Thomas L. Kilday, and Deborah Roberts, Greeneville, Tennessee, and Joshua M. Ball, Knoxville, Tennessee, for the appellant, Chalet Village Properties, Inc.

Eugene B. Dixon, Maryville, Tennessee, for the appellee, Patricia B. Stewart.

Theodore Hadzi-Antich, Sacramento, California, for the amicus curiae, Pacific Legal Foundation.

OPINION

Facts and Procedural History

On March 28, 2005, Patricia B. Stewart, a Georgia resident, signed a lease agreement for a three-night stay at a chalet in Gatlinburg, Tennessee. The lease agreement listed Chalet Village Properties, Inc. ("Chalet Village") as the rental agency. Allum Limited Partnership No. 1 ("Allum") owned the chalet. The lease agreement included an exculpatory clause, stating in pertinent part:

> I agree . . . that I will not hold Chalet Village Properties, Inc. responsible for any injuries or damages resulting from accidents occurring at the property or for the loss of money, jewelry, valuables, or personal property of any kind. I also understand that Chalet Village Properties, Inc. is not the owner of the property being rented, but is acting only as a rental agent for such actual owners, and therefore, it makes no warranties as to the condition of the premises.

On March 29, 2005, Stewart slipped and fell on an asphalt walkway leading to the door of the chalet. She filed a lawsuit against Chalet Village and Allum in the Sevier County Circuit Court for injuries sustained and medical expenses incurred. The complaint alleged that the walkway was dangerous and defective as a result of the negligence of Chalet Village and Allum in failing to properly maintain the walkway and that Stewart was not warned of the walkway's condition.

In its answer, Chalet Village denied that it was negligent and asserted that it could not be held liable based on the exculpatory clause in the lease agreement. Chalet Village also filed a cross-claim against Allum averring that Allum was in breach of the Chalet Rental Management Agreement ("management agreement") entered into between Chalet Village and Allum on February 1, 2001. Chalet Village contended that pursuant to the provisions of the management agreement it was entitled to be held harmless for Allum's negligence and to recover damages from Allum if Chalet Village was adjudged liable to Stewart. In its answer to the cross-claim, Allum acknowledged the existence of the management agreement but denied that it was in breach of the agreement and that Chalet Village had any basis for recovery against it. The management agreement is not included in the record.

Subsequently, Chalet Village moved for summary judgment against Stewart arguing that the exculpatory clause in the lease agreement was clear, unambiguous, and not invalid as against public policy. Stewart filed a response in which she argued that the exculpatory clause was against public policy and therefore invalid.

A hearing was held on March 23, 2007, during which the trial court observed that Chalet Village was "just a rental agent" and stated that the exculpatory clause in the lease agreement controlled. When counsel for Allum requested clarification that the trial court was granting summary judgment on the basis of the exculpatory clause and not based on a finding that Chalet

Village was not negligent, the trial court agreed with Allum's characterization of its ruling. Counsel for Allum suggested that later proceedings would provide evidence that Chalet Village had control of the rental property to the exclusion of Allum and further suggested that the trial court defer ruling until that information was presented.

On June 8, 2007, the trial court entered an order granting Chalet Village's motion for summary judgment and designated the order a final judgment pursuant to Tennessee Rule of Civil Procedure 54.02.[1] The order stated that "the [lease agreement] signed by Plaintiff Patricia Stewart was clear and unambiguous on its face and released Chalet Village Properties, Inc. for responsibility for any injuries or damages resulting from accidents occurring at the rental chalet in question."

Stewart filed a timely notice of appeal. The Court of Appeals concluded that the exculpatory clause was invalid as contrary to public policy, reversed the trial court's grant of summary judgment to Chalet Village, and remanded the case for further proceedings.

We granted Chalet Village's application for permission to appeal.

Analysis

Chalet Village's motion for summary judgment is based on the affirmative defense that the exculpatory clause in the lease agreement bars Stewart's negligence action. Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04.

Chalet Village, the moving party, "has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." Martin v. Norfolk S. Ry., 271 S.W.3d 76, 83 (Tenn. 2008). Chalet Village shifted the burden of production by alleging undisputed facts showing the existence of the exculpatory clause, an affirmative defense. See Hannan v. Alltel Publ'g Co., 270 S.W.3d 1, 9 n.6 (Tenn. 2008). Stewart does not dispute the existence of the exculpatory clause. Rather, Stewart argues that the exculpatory clause is invalid as contrary to public policy.

The trial court did not provide us with a ruling that applied the factors we adopted in Olson v. Molzen, 558 S.W.2d 429, 431 (Tenn. 1977), to determine whether an exculpatory clause violates

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[1] Tennessee Rule of Civil Procedure 54.02 provides, in pertinent part:

> When more than one claim for relief is present in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the Court, whether at law or in equity, may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

public policy. When we attempt to resolve the issue of the validity of the exculpatory clause, we are confronted with a bare factual record that fails to detail the responsibilities of Chalet Village or its relationship with Allum and leaves us to speculate about the importance of the role that Chalet Village played in this transaction. Without a more complete record, we are hampered in our application of the Olson factors as outlined below.

Generally, parties may contract that one shall not be held liable for negligence to the other. Empress Health & Beauty Spa, Inc. v. Turner, 503 S.W.2d 188, 190 (Tenn. 1973); Chazen v. Trailmobile, Inc., 384 S.W.2d 1, 3 (Tenn. 1964) (upholding a waiver of liability in favor of a lessor and lessee resulting from fire); Moss v. Fortune, 340 S.W.2d 902, 903-04 (Tenn. 1960). In Olson, however, we articulated an exception for exculpatory clauses that adversely affect the public interest. 558 S.W.2d at 431. Applying this exception in Olson, we invalidated an exculpatory clause signed by a patient in favor of a doctor providing medical treatment. Id. at 432.

In so holding, we adopted six factors for courts to consider when determining whether an exculpatory clause violates public policy. Id. at 431. It is unnecessary that all of these factors be present. Id. Generally, an exculpatory clause that has some of the following characteristics will violate public policy:

> [1] [The exculpatory clause] concerns a business of a type generally thought suitable for public regulation.
>
> [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.
>
> [3] The party holds [itself] out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards.
>
> [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks [its] services.
>
> [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence.
>
> [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or [the seller's] agents.

Id. (citing Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441, 445-46 (Cal. 1963)).

We previously applied these factors in Crawford v. Buckner, 839 S.W.2d 754, 756 (Tenn. 1992). In Crawford, the plaintiff rented a second-story apartment from the defendant landlords. As a condition of rental, the plaintiff signed the defendants' standard form lease, which included an exculpatory clause in the defendants' favor. Two months later, a fire started below the plaintiff's apartment. The plaintiff jumped out of her window to escape and sustained numerous injuries. The plaintiff brought an action alleging that the defendant landlords were negligent in failing to maintain the fire alarm and the premises behind her apartment and for permitting the downstairs neighbors to continue residing in the building after the defendants received complaints about their conduct. The defendants filed a motion for summary judgment based on the affirmative defense that the exculpatory clause in the lease agreement barred the plaintiff's action. We determined that the residential landlord-tenant relationship in Crawford satisfied all six of the Olson factors and invalidated the exculpatory clause. Id. at 757-59.

Tennessee courts, however, have upheld exculpatory clauses in a series of cases involving recreational activities. See, e.g., Empress Health & Beauty Spa, Inc., 503 S.W.2d at 191 (upholding a release from liability for injuries in favor of a health club); Moss, 340 S.W.2d at 429 (upholding a release from liability for injuries in favor of the operator of a horse-riding rental business); Henderson v. Quest Expeditions, Inc., 174 S.W.3d 730 (Tenn. Ct. App. 2005) (upholding a release from liability for injuries in favor of a white water rafting company), perm. app. denied (Oct. 24, 2005); Tompkins v. Helton, No. M2002-01244-COA-R3-CV, 2003 WL 21356420, *6 (Tenn. Ct. App. June 12, 2003) (upholding a release from liability for injuries in favor of the owners of a motor speedway); Burks v. Belz-Wilson Props., 958 S.W.2d 773, 776 (Tenn. Ct. App. 1997) (upholding a release from liability for injuries related to an employee's use of a "gymnastics pit" at an employer-sponsored event), perm. app. denied (Nov. 10, 1997); Dixon v. Manier, 545 S.W.2d 948 (Tenn. Ct. App. 1976) (upholding a release from liability for injuries arising from a hair-straightening treatment in favor of a cosmetology school and its operator).

During the hearing before the trial court, the parties argued that the Olson factors weighed in their favor. Likewise, Stewart argued that Crawford governed this case while Chalet Village argued that the cases addressing exculpatory clauses in recreational contracts controlled. Neither the transcript of the trial court hearing nor the trial court's order indicates, however, that the trial court applied the Olson factors to uphold the exculpatory clause in favor of Chalet Village. The trial court merely stated, "It's clear as a bell what [the contract] says. [Chalet Village is] just a rental agent, don't own the property. I have trouble, I guess, finding that there's much of a duty on their part to the plaintiff in this case." After being prompted by the parties, the trial court finally stated that it "[found] the contract to be controlling."

We agree with the trial court that the contract clearly contains an exculpatory clause. We remand, however, to the trial court to apply the Olson factors to determine whether the exculpatory clause in favor of Chalet Village violates public policy. In resolving Chalet Village's motion for summary judgment, the trial court must necessarily determine whether to extend Crawford to the

facts of this case. There are few facts in the record, however, to assist the trial court in applying the Olson factors. The management agreement between Chalet Village and Allum, for example, is conspicuously absent from the record. We therefore encourage the trial court to consider additional facts, including facts relating to Chalet Village's role in inspecting, maintaining, and leasing the property where Stewart sustained her injuries.

Conclusion

We reverse the judgment of the Court of Appeals and remand the case to the trial court to apply the factors adopted in Olson v. Molzen, 558 S.W.2d 429, 431 (Tenn. 1977). Costs of this appeal shall be assessed equally against the appellant, Chalet Village Properties, Inc., and the appellee, Patricia B. Stewart, for which execution may issue if necessary.

JANICE M. HOLDER, CHIEF JUSTICE